Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 94-71
	)	
SANTA MONICA COMMUNITY COLLEGE DISTRICT	)	File No. BPED-920305ME
	)	
For a Construction Permit for a New Noncommercial FM Station on Channel 204B at Mojave, California	)	
	)	
LIVING WAY MINISTRIES	)	File No. BPED-920511MC
	)	
For a Construction Permit for a New Noncommercial FM Station on Channel 205A at Lancaster, California	)	

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To: Chief Administrative Law Judge
Joseph Stirmer

MASS MEDIA BUREAU'S COMMENTS ON MOTION TO GRANT PENDING APPLICATION

1. On May 3, 1995, Santa Monica Community College District ("Santa Monica") filed a Motion to Grant Pending Application. The Mass Media Bureau submits the following comments.

2. Santa Monica requests the Presiding Judge to grant its application or, in the alternative, certify to the Commission the question as to whether Santa Monica's application should be granted. In support of its request for grant of its application, Santa Monica accurately and comprehensively sets forth the salient facts of this case. However, it has not

done so in similar fashion with respect to the prevailing law. Indeed, as will be explained more fully below, the instant matter presents a situation in which the applicable law governing the disposition of Santa Monica's application appears to conflict with the prevailing practice followed by Commission staff. Because of the apparent conflict that exists in this instance, the disposition of Santa Monica's application is a matter which requires consideration by the full Commission. Accordingly, the Bureau supports certification to the Commission in this instance.

3. Section 73.3605 of the Commission's Rules governs the disposition of certain applications that have been designated for hearing. Specifically, Section 73.3605(c) states:

> An application for a broadcast facility which has been designated for hearing and which is amended so as to eliminate the need for hearing or further hearing on the issues specified . . . *will be removed from hearing status.* (emphasis added).

The above language was originally contained in Section 1.363 and later Section 1.605 of the Commission's Rules. In originally adopting the provision, the Commission stated:

> The amended § 1.363 also takes specific note of those cases where a conflict between applications would be removed by an agreement to file an engineering amendment to an application. Where such an agreement is approved and the amendment is accepted, the new rule specifically provides that the amended application will be removed from hearing status and *returned to the processing line.* This is in accord with past Commission procedure in such cases. (emphasis added).

In the Matter of Amendment of Sections 1.311, 1.312 and 1.363 of the Commission's Rules, 20 RR 1669, 1672 (1961).

4. Clearly, in adopting the language that is today contained in Section 73.3605, the Commission intended that applications -- such as that filed by Santa Monica -- which are

amended after designation so as to eliminate their mutual exclusivity would be returned to the processing line for appropriate disposition. In Cabool Broadcasting Corp., 56 FCC 2d 573 (Rev. Bd. 1975), the Review Board acknowledged the plain meaning of the relevant provision. However, in Cabool, the Board determined that an amended application need *not necessarily* be taken out of hearing status despite the absence of further issues to be heard "if it can be determined that the rights of other interested applicants to comparative consideration for the new channel are not impaired." 56 FCC 2d at 576. Turning to the specific facts of the case, the Board ultimately waived Section 1.605 after finding that no entity other than the amending applicant had sought to apply for the new channel.[1] The Cabool decision appears to have become the rule, rather than the exception.

5. Ever since the Cabool decision, it has generally been the practice of presiding administrative law judges in adjudicatory proceedings involving mutually exclusive applications for new noncommercial educational stations[2] to retain in hearing status amended applications which would otherwise be required to be returned to the processing line, and, upon favorable recommendation of the Mass Media Bureau, to grant them. In each instance when an applicant files an amendment proposing technical changes after designation, the Bureau routinely conducts an engineering review of the proposal and files appropriate

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[1] The Board waived Section 1.605 without discussing the source of its delegated authority to do so.

[2] There is no Table of Allotments for noncommercial educational FM stations like there is for commercial FM stations. Consequently, applicants for new FM stations on noncommercial educational channels may propose operation on available alternative channels in order to avoid a hearing without the need to go through a rulemaking proceeding.

comments with the presiding judge. Among other things, each engineering review includes a channel study to determine whether the new proposal would cause objectional interference to existing or proposed facilities. Following receipt of a favorable recommendation from the Bureau and upon determining that the "good cause" requirement in Section 73.3522(b) has been satisfied, it has been the practice of presiding judges to accept the amendment and grant the application.

6. In the instant case, upon receipt of Santa Monica's post-designation amendment, the Bureau conducted a full and complete engineering analysis, including a channel study. The analysis did not reveal any conflict with existing stations. Additionally, the analysis did not disclose any conflict with other proposals, including the previously-filed California State University at Long Beach ("Cal State") application for modification of facilities of Station KLON-FM. It is now known that the analysis failed to reveal the Cal State application because Cal State's proposed new parameters had not yet been entered into the Commission's data base. Thus, at least initially, this case appeared similar to Cabool in that the Bureau's analysis did not disclose any expression of interest by any other applicants in the channel to which Santa Monica sought to amend. In comments filed with the Presiding Judge on the same day that it conducted its engineering analysis, the Bureau recommended favorable action on the Santa Monica application. By Memorandum Opinion and Order, FCC 94M-453 (released July 25, 1994), in reliance on the Bureau's favorable recommendation, the Presiding Judge accepted the amendment, approved a settlement agreement between Santa Monica and Living Way Ministries, and granted the latter application. The Presiding Judge

did not grant Santa Monica's application and terminate the proceeding because Santa Monica had not yet received a "No Hazard Determination" from the Federal Aviation Administration. Had Santa Monica already received FAA approval for its new proposal, it is more than likely that the Presiding Judge would have also granted the Santa Monica application and terminated this case.[3]

7. The prevailing practice by presiding administrative law judges of granting applications which have been amended so as to eliminate their mutual exclusivity appears to conflict directly with the requirements of Section 73.3605(c) of the Commission's Rules. The practice also raises certain policy considerations. First and foremost, by not returning amended applications to the processing line to be placed on a new cut-off list, the practice would seem to deprive interested parties of the opportunity to file competing applications, in violation of Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).[4] On the other hand, if

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[3] The Bureau has since revised its review procedures in order to reduce the likelihood that a presiding judge will accept a post-designation amendment that is in potential conflict with another, previously-filed proposal. In addition to conducting a channel study on the Bureau's filing deadline, the Bureau now routinely requests presiding judges to provide advance notice of their intention to adopt an order accepting the amendment. The Bureau then conducts an additional "eleventh hour" channel study just prior to adoption of the order to ensure that the presiding judge's acceptance of the amendment will not create conflict with any other proposals.

[4] In this regard, it is unclear whether a presiding judge's order *accepting* a post-designation amendment provides adequate notice to the public in the same manner as a cut-off list does announcing the *filing* of a proposal. In the instant case, Santa Monica argues at ¶¶ 7-9 of its Motion that Cal State essentially forfeited any rights it may have had to appeal the Presiding Judge's MO&O, despite the fact that Cal State received constructive notice of Santa Monica's amendment on the release date of the MO&O and actual notice of the amendment some three weeks later when Santa Monica filed an Informal Objection to the Cal State application. However, assuming, arguendo, that Cal State had a right to appeal the

Section 73.3605(c) were strictly enforced, mutually exclusive applicants would be less inclined to settle their differences through the filing of technical amendments because this would require them to incur the risk of further competition.

8. In its Motion, Santa Monica makes a convincing argument why the Presiding Judge's Memorandum Opinion Order, FCC 94M-453 (released July 25, 1994), has become final. Nevertheless, it is certainly not a simple, ministerial act, as Santa Monica seems to suggest, for the Presiding Judge to now grant its amended application. Given the pendency of Cal State's application and the conflict discussed above, the Bureau submits that favorable action upon Santa Monica's application would be inappropriate at this time because the Presiding Judge cannot make the requisite determination that grant of the application will serve the public interest, convenience and necessity. See Section 309(a) of the Communications Act of 1934, as amended. Rather, certification of the question as to whether Santa Monica's application should be granted is entirely warranted.[5] Pursuant to Section 1.106(a)(2) of the Commission's Rules, substantial doubt exists, on established policy and undisputed facts, as to the disposition of Santa Monica's application. Additionally, because this case presents a situation which might very well reoccur, Commission consideration is plainly required at this time to avoid a similar conflict in the future.

MO&O, it would have had to act, if at all, within *five* days of release of the MO&O, pursuant to §§ 1.301(b) and (c)(2) of the Commission's Rules.

[5] Assuming the Board's decision in Cabool remains valid law, it may be necessary for the Commission to designate the Santa Monica and Cal State applications for hearing consistent with Section 307(b) of the Communications Act of 1934, as amended.

9. Accordingly, the Presiding Judge should certify this matter to the Commission for prompt and final disposition.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau

Norman Goldstein
Chief, Complaints & Investigations Branch

Charles E. Dziedzic
Gary P. Schonman
Attorneys
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554
(202) 632-6402

May 9, 1995

CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Complaints & Investigations Branch, Mass Media Bureau, certify that I have, on this 9th day of May 1995, sent by regular United States mail, copies of the foregoing, "Mass Media Bureau's Comments on Motion to Grant Pending Application" to:

Lewis J. Paper, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

Gary Curtis, Esq.
Executive Director
Living Way Ministries
14820 Sherman Way
Van Nuys, California 91405

Patricia A. Mahoney, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Rosslyn, Virginia 22209
(Courtesy Copy)

Michelle C. Mebane